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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. STEVEN JAMES KING, Appellant.	)	2 CA-CR 2010-0105 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20051648

Honorable Gus Aragón, Judge
Honorable Jane L. Eikleberry, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
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K E L L Y, Judge.

¶1 Following a jury trial, appellant Steven King was convicted of four counts of aggravated driving while under the influence of an intoxicant (DUI). He was

sentenced to concurrent, 6.5-year terms of imprisonment. On appeal, he argues the trial court erred by 1) denying his motion to dismiss based on the state's destruction of evidence, 2) finding the officers had reasonable suspicion to seize him, 3) failing to suppress the results of his blood draw, and 4) denying his motion for a judgment of acquittal. Finding no error, we affirm.

Background

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). While driving on an interstate highway, K.F. saw a truck weaving back and forth. The truck nearly collided with a guard rail and another vehicle and "couldn't seem to stay in [its] lane." K.F. called 9-1-1 on his cellular telephone, remained on the phone, and followed the truck, which eventually exited the interstate and parked in a business parking lot.

¶3 Marana police officer Joseph Castillo responded to K.F.'s report and, based on the description and license plate provided to him by police dispatch, located the truck. Castillo discovered King, the sole occupant of the vehicle, asleep at the wheel with the engine running and the headlights on. After Castillo woke him, King exhibited numerous signs of impairment, and Castillo determined his license had been revoked. King was arrested, and a subsequent test revealed his blood alcohol level was more than three times the legal limit. Before trial, King filed a motion to dismiss arguing his due process rights had been violated by the state's destruction of certain evidence. King also filed a motion to suppress the results of his blood test. The trial court denied both motions and King was convicted and sentenced as described above. This appeal followed.

Discussion

Motion to Dismiss

¶4 King first claims the trial court erred by denying his motion to dismiss because his due process rights were violated by the state's destruction of the 9-1-1 and police dispatch tapes. We review a court's denial of a motion to dismiss for an abuse of discretion. *State v. Pecard*, 196 Ariz. 371, ¶ 24, 998 P.2d 453, 458 (App. 1999).

¶5 A "'defendant is not deprived of due process by the destruction of evidence unless the state has acted in bad faith or the defendant is prejudiced by the loss.'" *State v. Youngblood*, 173 Ariz. 502, 507, 844 P.2d 1152, 1157 (1993), *quoting State v. Day*, 148 Ariz. 490, 496, 715 P.2d 743, 749 (1986), *abrogated on other grounds by State v. Ives*, 187 Ariz. 102, 106-08, 927 P.2d 762, 766-68 (1996). Moreover, when it is unknown whether the nature of the evidence is exculpatory, inculpatory, or neutral, "there can be no showing of prejudice in fact" and, "[t]hus, only a showing of bad faith implicates due process." *Id.*; *see also State v. O'Dell*, 202 Ariz. 453, ¶ 12, 46 P.3d 1074, 1078 (App. 2002) (when evidence in controversy no longer exists, due process violated only upon showing of bad faith). The determination of bad faith "must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Arizona v. Youngblood*, 488 U.S. 51, 56 n.* (1988); *see also State v. Dunlap*, 187 Ariz. 441, 452, 930 P.2d 518, 529 (App. 1996).

¶6 King claims that because there were "discrepancies" in K.F.'s testimony, the contents of the 9-1-1 tape may have had "potential for impeachment." But, King concedes "it is unknown what information [K.F.] relayed," and his arguments that the

recordings may have contained exculpatory evidence ultimately are speculative. Therefore, a showing of bad faith is required to establish a due process violation. *Youngblood*, 173 Ariz. at 507, 844 P.2d at 1157.

¶7 Relying on *State v. Lopez*, 156 Ariz. 573, 754 P.2d 300 (App. 1987), King argues the state acted in bad faith by failing to preserve the tapes. In *Lopez*, this court ruled that "[w]hen the state receives a specific request for [potentially exculpatory] evidence, failure to disclose is seldom, if ever, excusable." 156 Ariz. at 574, 754 P.2d at 301. But, *Lopez* is inapposite. In that case it was "undisputed" that the state had received the defendant's request for preservation of evidence before the evidence was destroyed. *Id*. at 574-75, 754 P.2d at 301-02. Here, King concedes, and the trial court noted, "911 tapes and dispatch tapes are destroyed after 60 days" as a matter of routine procedure. And, King acknowledged below that he did not request disclosure of the tapes until after they had been destroyed pursuant to this policy. Thus, unlike the situation in *Lopez*, it appears the officers here destroyed the tapes in accordance with their normal practice. And, nothing in the record suggests the state was aware King believed the tapes contained evidence favorable to him and wished them to be preserved. We therefore find no indication that the state acted in bad faith. *See O'Dell*, 202 Ariz. 453, ¶ 12, 46 P.3d at 1078. Accordingly, King's right to due process was not violated.

¶8 King also argues the trial court erred by denying his motion to dismiss because the state violated Rule 15.1, Ariz. R. Crim. P., by failing to disclose the tapes. He notes that Rule 15.1(b)(1) requires the state to make available to the defendant "[t]he names and addresses of all persons whom the prosecutor intends to call as witnesses . . .

together with their relevant written or recorded statements." But, the state is required to disclose only 9-1-1 tapes "existing at the time of the request." Ariz. R. Crim. P. 15.1(e)(2); *see also* Ariz. R. Crim. P. 15.1(b) (Rule 15.1 requirement applies only to information within the state's "possession or control"). At the time King requested the tapes, they already had been destroyed. Consequently, the court did not abuse its discretion in denying the motion to dismiss.[1]

Reasonable Suspicion for Stop

¶9 King claims Castillo lacked reasonable suspicion to seize him and the trial court erred in ruling otherwise. King did not present this argument to the trial court. He has therefore forfeited this issue absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19–20, 115 P.3d 601, 607 (2005). Because King does not argue the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error review waived when defendant fails to argue fundamental error on appeal).

Blood Draw

¶10 King next asserts the trial court erred by denying his motion to suppress the results of his blood test. "In reviewing a motion to suppress, we consider only the evidence presented at the suppression hearing and view it in the light most favorable to

[1]Because we conclude the state did not violate Rule 15.1, we do not consider King's argument that the trial court erred by failing to impose sanctions for a discovery violation.

upholding the trial court's factual findings." *State v. Fornof*, 218 Ariz. 74, ¶ 8, 179 P.3d 954, 956 (App. 2008). We will not reverse the court's ruling absent an abuse of discretion. *See State v. Livingston*, 206 Ariz. 145, ¶ 3, 75 P.3d 1103, 1104 (App. 2003). Although we defer to the court's factual findings, we review its legal conclusions de novo. *See State v. Sanchez*, 200 Ariz. 163, ¶ 5, 24 P.3d 610, 612 (App. 2001).

¶11 Citing *Schmerber v. California*, 384 U.S. 757 (1966), King first claims the trial court should have granted the motion to suppress because any blood draw performed by a police officer is unconstitutional. Blood tests administered at the behest of law enforcement officers constitute searches that implicate Fourth Amendment protections, which "constrain . . . against intrusions . . . not justified in the circumstances, or . . . made in an improper manner." *Schmerber*, 384 U.S. at 768. However, as we have previously held, "allowing a properly qualified police officer to draw blood during a DUI arrest does not violate the Fourth Amendment." *State v. Noceo*, 223 Ariz. 222, ¶ 7, 221 P.3d 1036, 1038-39 (App. 2009). We therefore reject King's claim that law enforcement officers are per se barred from drawing blood.[2]

¶12 King next contends the evidence should have been suppressed because Marana police officer Joshua Everhart, who performed the blood draw, did not possess "the statutory qualifications required to draw blood." Section 28-1388(A), A.R.S.,

[2]To the extent King asserts that a blood draw conducted by a law enforcement officer is a per se violation of due process based on the "inherent conflict of interest that is created when someone is asked to play the roles of police officer and phlebotomist at the same time," we likewise reject this claim. As discussed below, because the blood draw in this matter was both reasonable and constitutional, we find no support for this "inherent conflict" in the record before us.

provides that "a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood." "[A] person is 'qualified' to draw blood for DUI purposes if he or she is competent, by reason of training or experience, in that procedure." *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, ¶ 20, 30 P.3d 649, 655 (App. 2001).

¶13 Everhart testified that before performing the blood draw in this case he had completed a one-week "Phlebotomy for Law Enforcement course" consisting of "classroom instruction [and] hands-on training" in conducting blood draws. At the time he drew King's blood, he had a current "certificate of training as a qualified phlebotomist" and "typically [performed] one to two blood draws a night, five days a week." Based on this testimony, the trial court properly could conclude Everhart had sufficient training and experience "to draw blood for DUI purposes."[3] *Id.*; *cf. State v. May*, 210 Ariz. 452, ¶ 10, 112 P.3d 39, 42 (App. 2005) (holding officer who had completed one-week phlebotomy course and had field experience sufficiently qualified to draw blood).[4]

¶14 King next argues the trial court erred in failing to suppress the evidence because "[t]he blood draw was not administered in a medical environment," but rather

[3]For this reason, we likewise reject King's argument that Everhart was not qualified to draw blood because he was not a "medically trained professional."

[4]King also complains the lack of supervision over Everhart rendered the blood draw improper. However, our jurisprudence already has rejected this argument, and we see no reason to depart from that authority here. *See Pennartz*, 200 Ariz. 582, ¶ 2, 30 P.3d at 651 (phlebotomists qualified to "perform blood draws for forensic purposes under section 28-1388(A) without the supervision of a licensed medical professional"); *see also Noceo*, 223 Ariz. 222, ¶ 11, 221 P.3d at 1040.

was performed at the police stationhouse. In support, King argues "*Schmerber* prohibits the drawing of blood 'in the privacy of the stationhouse.'" But, although *Schmerber* held that a blood draw taken by a physician in a medical environment was reasonable, it "'did not attempt to set any specific rules for blood tests conducted outside the hospital setting.'" *May*, 210 Ariz. 452, ¶ 6, 112 P.3d at 41, *quoting People v. Esayian*, 5 Cal. Rptr. 3d 542, 549 (Ct. App. 2003). And, contrary to King's assertion, there is no requirement that a blood draw take place in a hospital environment. *See id.*

¶15 Rather, the Fourth Amendment requires only that a defendant's blood be drawn in a reasonable manner. *See id.* ¶¶ 5-6. The record here contains no indication that the blood draw was performed in an unreasonable manner. Everhart testified he had conducted the draw in a room at the stationhouse and followed standard protocol, sterilizing the table he had used, supporting King's arm, and sterilizing the puncture area before performing the draw. The blood draw was accomplished successfully on the first attempt, and King does not allege that any complications occurred as a result. Accordingly, the trial court did not err in denying King's motion to suppress.

Motion for Judgment of Acquittal

¶16 King next claims the trial court erred in denying his motion for judgment of acquittal made pursuant to Rule 20, Ariz. R. Crim. P. We review de novo the denial of a motion for judgment of acquittal. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). Such motion should be granted only "if there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20; *see also State v. Spears*, 184 Ariz. 277, 290, 908 P.2d 1062, 1075 (1996) (judgment of acquittal appropriate only when complete

absence of substantial evidence supporting conviction). "Substantial evidence is more than a mere scintilla and is such proof that 'reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt.'" *State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990), *quoting State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980). "If reasonable minds can differ on the inferences to be drawn from the evidence, a trial court has no discretion to enter a judgment of acquittal and must submit the case to the jury." *State v. Alvarez*, 210 Ariz. 24, ¶ 10, 107 P.3d 350, 353 (App. 2005), *vacated in part on other grounds by State v. Alvarez*, 213 Ariz. 467, 143 P.3d 668 (App. 2006).

¶17 King argues the trial court should have granted a judgment of acquittal because "the state failed to prove beyond a reasonable doubt that [he] was in actual physical control of the vehicle." To convict King of aggravated DUI, the state was required to prove that he had driven or been in actual physical control of a motor vehicle while under the influence of, inter alia, an intoxicating liquor. *See* A.R.S. §§ 28-1381(A)(1), (2); 28-1383. "The phrase 'actual physical control' has never been defined in Arizona's DUI statutes, but it has been the focus of an evolving series of court decisions." *State v. Rivera*, 207 Ariz. 69, ¶ 9, 83 P.3d 69, 72 (App. 2004) (citation omitted). The trier of fact determines whether a person is in actual physical control based on the "totality of the circumstances." *State v. Love*, 182 Ariz. 324, 326, 897 P.2d 626, 628 (1995).

¶18 Factors a jury may consider in determining if a defendant was in actual physical control include

> whether the vehicle was running or the ignition was on; where the key was located; where and in what position the driver was found in the vehicle; whether the person was awake or asleep; if the vehicle's headlights were on; where the vehicle was stopped (in the road or legally parked) . . . and any explanation of the circumstances advanced by the defense.

Id. Ultimately, it is up to the trier of fact to "examine all the available evidence and weigh its credibility in determining whether the defendant actually posed a threat to the public by the exercise of present or imminent control of the vehicle while impaired."[5] *State v. Zaragoza*, 221 Ariz. 49, ¶ 21, 209 P.3d 629, 634-35 (2009).

¶19 Here, K.F. testified he had observed the truck on the highway, had followed it to the parking lot after briefly losing sight of it, and had observed it until officers arrived. No one had exited or entered the vehicle during that time. And the number on the license plate of King's truck was the same number K.F. had reported. Castillo testified the vehicle engine had been running and the headlights were on when he encountered King asleep behind the wheel. Based on the evidence presented, reasonable persons could conclude King "actually posed a threat to the public by the exercise of present or imminent control over [the vehicle] while impaired." *Id*.

[5]King alleges without argument or citation to authority that the trial court erred by failing to "instruct the jury on the various factors it could consider in determining whether or not [he] had actual physical control of the truck." But, we note King's proposed jury instruction on actual physical control was substantially identical to that given by the court. And, in any event, he did not object to the instruction or raise this argument in the trial court. The issue is therefore waived. *See State v. Van Winkle*, 126 Ariz. 476, 477, 616 P.2d 936, 937 (App. 1980) (alleged defect in jury instruction waived on appeal by failure to object in trial court).

¶20 Nevertheless, King argues the evidence was insufficient because the officers were unable to locate the keys to his truck during an inventory search. But, even assuming this factor favors King, it does not prove as a matter of law that he was not in actual physical control of the vehicle. *See id*. (location of keys one possible factor jury may consider in evaluating totality of circumstances). It was for the jury, not this court, to weigh the evidence, which it did. *See id*. Accordingly, the trial court did not abuse its discretion in denying King's Rule 20 motion.

Disposition

¶21 King's convictions and sentences are affirmed.

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge

CONCURRING:

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge